Guideline Sentencing Update

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General Application

Double Jeopardy

Supreme Court holds that use of relevant conduct to increase guideline sentence for one offense does not preclude later prosecution for that conduct. When defendant was sentenced on a marijuana charge his offense level was increased under § 1B1.3 for related conduct involving cocaine. This increased his guideline range (from approximately 78–97 months to 292–365 months), although he then received a § 5K1.1 departure to 144 months. Defendant was later indicted for conspiring and attempting to import cocaine, but the district court dismissed the charges on the ground that punishing defendant for conduct that was used to increase his sentence for the marijuana offense would violate the Double Jeopardy Clause's prohibition against multiple punishments. However, the Fifth Circuit reversed, holding that "the use of relevant conduct to increase the punishment of a charged offense does not punish the offender for the relevant conduct," and therefore prosecution for the cocaine offenses was not prohibited by the Double Jeopardy Clause. *U.S. v. Wittie*,* 25 F.3d 250, 258 (5th Cir. 1994) [6 *GSU* #16].

The Supreme Court agreed with the appellate court that there is no double jeopardy bar to the second prosecution. "We find this case to be governed by *Williams [v. Oklahoma,]*" 358 U.S. 576 (1959), in which the Court "made clear that use of evidence of related criminal conduct to enhance a defendant's sentence for a separate crime within the authorized statutory limits does not constitute punishment for that conduct within the meaning of the Double Jeopardy Clause. . . . We are not persuaded by petitioner's suggestion that the Sentencing Guidelines somehow change the constitutional analysis. A defendant has not been 'punished' any more for double jeopardy purposes when relevant conduct is included in the calculation of his offense level under the Guidelines than when a pre-Guidelines court, in its discretion, took similar uncharged conduct into account. . . . As the Government argues, '[t]he fact that the sentencing process has become more transparent under the Guidelines ... does not mean that the defendant is now being "punished" for uncharged relevant conduct as though it were a distinct criminal "offense."' . . . The relevant conduct provisions are designed to channel the sentencing discretion of the district courts and to make mandatory the consideration of factors that previously would have been optional. . . . Regardless of whether particular conduct is taken into account by rule or as an act of discretion, the defendant is still being punished only for the offense of conviction."

The Court also addressed petitioner's "contention that he should not receive a second sentence under the Guidelines for the cocaine activities that were considered as relevant conduct for the marijuana sentence. As an examination of the pertinent sections should make clear, however, the Guidelines take into account the potential unfairness with which petitioner is concerned. . . . There are often valid reasons why related crimes committed by the same defendant are not prosecuted in the same proceeding, and § 5G1.3 of the Guidelines attempts to achieve some coordination of sentences imposed in such situations with an eye toward having such punishments approximate the total penalty that would have been imposed had the sentences for the different offenses been imposed at the same time (i.e., had all of the offenses been prosecuted in a single proceeding). *See* USSG § 5G1.3, comment., n. 3." Along with the protections in § 5G1.3, the Court noted that a district court retains discretion to depart "to protect against petitioner's second major practical concern: that a second sentence for the same relevant conduct may deprive him of the effect of the downward departure under § 5K1.1 of the Guidelines for substantial assistance to the Government, which reduced his first sentence significantly. Should petitioner be convicted of the cocaine charges, he will be free to put his argument concerning the unusual facts of this case to the sentencing judge as a basis for discretionary downward departure."

Witte v. U.S., 115 S. Ct. 2199, 2206–09 (1995) (Stevens, J., dissenting in part).

*Note: Spelling of defendant's name was incorrect in the appellate court case title.

See *Outline* at I.A.4.

Determining the Sentence

Consecutive or Concurrent Sentences

Seventh Circuit concludes departure may be warranted when § 5G1.3(b) does not apply because a prison term for related conduct has already been served. Defendant was convicted of conspiracy to commit bank fraud. At sentencing the government and defendant requested a downward departure of

fourteen months to account for a sentence defendant served in prison for related conduct that was considered in setting the offense level for the instant offense. Had defendant still been serving the prior sentence, § 5G1.3(b) would have effected the same result by requiring concurrent sentences. The district court refused to depart, based on a belief that defendant's prior sentence was mistakenly too lenient.

The appellate court concluded that the district court acted within its discretion in refusing to depart and that its decision was, "like any other refusal to depart, unreviewable." However, the sentence was remanded on another matter and the court "encouraged" the district court to reconsider. "Section 5G1.3 on its face does not apply to [defendant] because, by the time of his sentencing in Milwaukee, he had completed his term for the related conduct in Kansas and therefore had no relevant 'undischarged term of imprisonment.' The probation office in this case apparently recognized that the rationale underlying § 5G1.3—to avoid double punishment—nevertheless was applicable to a defendant . . . who had fully discharged his prior term. It sought guidance from the Sentencing Commission, which suggested that a downward departure would be the appropriate way to recognize such a defendant's prior time in prison. . . . We recognize that distinguishing between two defendants merely by virtue of their sentencing dates appears contrary to the Guidelines 'goal of eliminating unwarranted sentence disparities.' . . . Although we may not directly review the district court's rejection of a departure, we do encourage the court upon remand to reconsider its decision. . . . Assuming [defendant] would have been eligible for the 14-month credit if he still were serving the prior terms at issue, we think it would be fair and appropriate to deduct that amount from the new sentence imposed on the instant offense."

U.S. v. Blackwell, 49 F.3d 1232, 1241–42 (7th Cir. 1995).

See *Outline* generally at V.A.3.

Ninth Circuit holds that sentence under 18 U.S.C. § 924(e)(1) may be reduced below mandatory minimum to give credit for time served on related charge. Defendant was serving a state sentence for armed robbery when he pled guilty to being a felon in possession of the same weapon used in the robbery. Because he had three prior violent felony convictions, 18 U.S.C. § 924(e)(1) required that he be "imprisoned not less than fifteen years," and the government and defendant agreed to a guideline sentence of 188 months. The district court agreed with defendant that, under § 5G1.3(b) and comment. (n.2), the state sentence had been "fully taken into account" in determining the federal sentence and the two sentences should be made concurrent with credit for the twelve months defendant had served on the state charge, i.e., the federal sentence should be 176 months. However, the district court concluded it could not go below the mandatory 180 months and imposed the agreed-on guideline sentence of 188 months.

The appellate court remanded, following the holding in *U.S. v. Kiefer*, 20 F.3d 874 (8th Cir. 1994) [6 *GSU* #12], that "in appropriate circumstances time served in custody prior to the commencement of the mandatory minimum sentence is time 'imprisoned' for purposes of § 924(e)(1)." The court concluded that time served in state prison on a related charge is "an appropriate circumstance," and that in order to harmonize § 924(e) with the guideline sentencing scheme and the rest of the Sentencing Reform Act of 1984, "we construe 18 U.S.C. § 924(e)(1) to require the court to credit Drake with time served in state prison. To hold otherwise would 'frustrate the concurrent sentencing principles mandated by other statutes.' . . . [T]he district court indeed was required to reduce Drake's mandatory minimum sentence for the time Drake served in Oregon prison."

U.S. v. Drake, 49 F.3d 1438, 1440–41 (9th Cir. 1995).

See *Outline* at V.A.3.

Adjustments

Obstruction of Justice

Tenth Circuit holds that obstruction enhancement does not apply if defendant did not know that an investigation of the offense of conviction had begun. Defendant was part of a conspiracy to manufacture explosives without a license. One of the conspirators was arrested on an unrelated weapons charge, and while he was being questioned at the police station the police received a tip about the explosives. In the meantime, without knowing that the police had begun to investigate the explosives manufacture, defendant and others attempted to hide the explosive materials. The police ultimately recovered the explosives and defendant pled guilty to conspiracy. She received a § 3C1.1 enhancement for obstructing the investigation by hiding the explosives, but argued on appeal that she should not have received the enhancement for obstructing an investigation of which she was unaware.

The appellate court agreed and remanded. "A plain reading of U.S.S.G. § 3C1.1 compels the conclusion that this provision should be read only to cover willful conduct that obstructs or attempts to obstruct '*the* investigation . . . of *the* instant offense.' (emphasis added) . . . To our mind, the clear language of

§ 3C1.1 enunciates a nexus requirement that must be met to warrant an adjustment. This requirement is that the obstructive conduct, which must relate to the offense of conviction, must be undertaken during the investigation, prosecution, or sentencing. Obstructive conduct undertaken prior to an investigation, prosecution, or sentencing; prior to any indication of an impending investigation, prosecution, or sentencing; or as regards a completely unrelated offense, does not fulfill this nexus requirement. . . . There is simply no evidence that Ms. Gacnik undertook to hide the explosive materials with any knowledge of an impending investigation or during any investigation of the conspiracy for which she was ultimately convicted. We disagree with the district court that the very act of concealment, standing alone, is sufficient evidence of Ms. Gacnik's awareness of an investigation pointed at her offense of conviction. The record reveals only that Ms. Gacnik was aware that the police had taken Mr. Gade into custody for having discharged a gun, but this knowledge of police interest in a completely unrelated offense, not involving her, simply does not meet the requirements of § 3C1.1."

U.S. v. Gacnik, 50 F.3d 848, 852–53 (10th Cir. 1995).

See *Outline* at III.C.4.

Seventh Circuit holds that obstruction of related state prosecution does not warrant enhancement unless it actually obstructed federal prosecution of the "instant offense." Defendant was arrested in April 1992 on a state drug charge. After release on bond in June he fled the country but returned in November. He was rearrested by the state in December, at which time a federal investigation into defendant's drug activities began. After defendant was convicted and began serving his sentence on the state charge, he was indicted on federal charges and pled guilty to conspiracy to distribute cocaine. Concluding that the criminal conduct underlying the state prosecution from which defendant fled constituted part of the criminal conduct underlying the instant federal offense, and that defendant's flight impeded the state prosecution and investigation, the district court applied the § 3C1.1 obstruction enhancement. "In short, the district court considered the state and federal offenses to be one and the same and, for purposes of section 3C1.1, the 'instant offense' included the state prosecution."

The appellate court remanded because there was no evidence that defendant's flight obstructed the federal investigation or prosecution. The court acknowledged that "because the state offense was an overt act of the federal conspiracy charge, arguably the state offense is part of the 'instant offense' for purposes of section 3C1.1. Consequently, there is a basis for the district judge to say as she did that 'it's the same offense you look at and not the particular entity that was prosecuting it at the time the obstruction occurred.' Although we agree that the factual basis for the state charges are encompassed within the federal offense, the inclusiveness of the federal offense does not necessarily dictate the conclusion that any obstruction of the prior state prosecution automatically compels a finding that the federal prosecution was also obstructed. This is too long a stretch and ignores the temporal requirement of [§]3C1.1 that the obstructive conduct occur 'during' the investigation, prosecution, or sentencing of the instant offense. In other words, section 3C1.1 intends that the obstructive conduct have some discernible impact on the investigation, prosecution, or sentencing of the federal offense which may or may not encompass the state offense. . . . Obstructive conduct having no impact on the investigation or prosecution of the federal offense falls outside the ambit of section 3C1.1 no matter when the obstruction occurs; i.e., whether it occurs during a state or federal investigation or prosecution. Even if the state and federal offenses are the same, under section 3C1.1 it is the federal investigation, prosecution, or sentencing which must be obstructed by the defendant's conduct no matter the timing of the obstruction."

U.S. v. Perez, 50 F.3d 396, 398–400 (7th Cir. 1995).

See *Outline* at III.C.4.

Sixth Circuit holds that § 3C1.2 enhancement for reckless endangerment does not apply if defendant did not know a law enforcement officer was in pursuit. Defendant was driving away from a drug delivery site when detectives in an unmarked police van attempted to block the car and arrest the occupants. Defendant swerved around the van, striking the leg of a detective who had jumped out of the van, and was eventually arrested. Without making a finding that defendant knew that police officers were in pursuit at the time he swerved around the van, the district court imposed a § 3C1.2 enhancement. The appellate court remanded "for the district court to make a specific finding regarding defendant's knowledge," holding that "a § 3C1.2 enhancement is inapplicable if the defendant did not know it was a law enforcement officer from whom he was fleeing."

The appellate court also held that the sentence was appealable even though defendant had received a downward departure under § 5K1.1 to a sentence below the ranges suggested by both the government and defendant. "A defendant may appeal his sentence even when the sentence imposed fell within the range advocated by him so long as he can iden-

tify a specific legal error," which defendant did with his claim of a misapplication of § 3C1.2. Thus, this decision is consistent with cases that have held that the guideline range is the point of reference for a departure and must be correctly calculated. See cases in *Outline* at VI.D.

U.S. v. Hayes, 49 F.3d 178, 182–84 (6th Cir. 1995).

See *Outline* at III.C.3.

Offense Conduct

Marijuana

Eleventh Circuit holds that "dead, harvested root systems are not 'plants' within the meaning of" the statute or Guidelines. When defendant was arrested police found 27 live marijuana plants and, in a trash can, "26 dead, crumbling roots, each attached to a small portion of the stalk ('root systems'), remaining from previously-harvested plants." The district court counted all 53 plants and sentenced defendant under § 2D1.1(c), n.*, which treats each plant as one kilogram of marijuana for offenses involving 50 or more plants.

The appellate court remanded, concluding "that *clearly dead* vegetable matter is not a plant." The court reasoned that its decision in *U.S. v. Foree*, 43 F.3d 1572 (11th Cir. 1995), holding that marijuana cuttings and seedlings are not "plants" until they develop root systems, "treats evidence of life as a necessary (but alone insufficient) prerequisite of 'planthood,' and its reasoning counsels rejection of the government's converse contention here that dead marijuana remains are plants simply because they have roots."

The court also noted that it has held that once plants are harvested the actual weight must be used, not the kilogram-per-plant equivalency, and specifically disagreed with circuits that have held that the number of plants may be used even after harvesting. See cases summarized in 7 *GSU* nos. 7 & 8. "Our decisions . . . contemplate the use of actual post-harvest weight of consumable marijuana, rather than presumed weight derived from the number of harvested plants, for sentencing in manufacturing and conspiracy to manufacture, as well as possession, cases. . . . The fact that [21 U.S.C.] § 841(b) creates *alternative* plant number and marijuana weight sentencing regimes implies that growers should not continue to be punished for plants when those plants cease to exist. . . . We therefore reaffirm that dead, harvested root systems are not marijuana plants for sentencing purposes irrespective of whether the defendant is convicted of possession, manufacturing, or conspiracy to manufacture marijuana plants. We leave it to the district court to decide, in the first instance, how the 26 dead root systems should be accounted for in sentencing in this case (as they cannot be counted as plants)."

U.S. v. Shields, 49 F.3d 707, 710–13 (11th Cir. 1995).

See *Outline* at II.B.2.

Certiorari Granted:

U.S. v. Neal, 46 F.3d 1405 (7th Cir. 1995) (en banc), *cert. granted*, No. 94-9088 (June 19, 1995). Question presented: Does amendment to Sentencing Guidelines establishing presumptive weight of LSD for purposes of establishing base offense level for violations involving LSD change manner of computing weight of LSD for purposes of statute imposing mandatory minimum sentence for possession or distribution?

See *Outline* at II.B.1 and summary of *Neal* in 7 *GSU* #7.

Judgment Vacated:

U.S. v. Porat, 17 F.3d 660 (3d Cir. 1994), *vacated on other grounds*, No. 94-140 (U.S. June 26, 1995), and remanded for reconsideration in light of *U.S. v. Gaudin*, No. 94-514 (U.S. June 19, 1995).

See *Outline* at V.C and summary of *Porat* in 6 *GSU* #11.

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